

COMMISSIONERS' ORDINANCE NO. _____

AN ORDINANCE AMENDING CHAPTER 37 OF THE COVINGTON CODE
OF ORDINANCES TO CONFORM WITH RECENT CHANGES TO THE
KENTUCKY OPEN RECORDS ACT.

* * * *

WHEREAS, all public agencies within the Commonwealth of Kentucky are subject to the Kentucky Open Records Act ("KORA") (KRS 61.870 to KRS 61.884), declaring that "free and open examination of public records is in the public interest" (KRS 61.871); and

WHEREAS, KRS 61.876(1) directs public agencies subject to KORA to adopt "rules and regulations in conformity with the provisions of KRS 61.870 to KRS 61.884 to provide full access to public records" aimed at ensuring "efficient and timely action in response to application for inspection" as well as "protect[ing] public records from damage and disorganization" and "prevent[ing] excessive disruption of its essential functions;" and

WHEREAS, the Kentucky General Assembly Kentucky enacted House Bill 312 in the 2021 Regular Session which amended various provisions of KORA; and

WHEREAS, the City of Covington recognizes its duty to adopt rules and regulations that conform to the provisions of KORA by implementing and enforcing a uniform and comprehensive policy that affords access to public records.

NOW THEREFORE,
BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY
OF COVINGTON, KENTON COUNTY, KENTUCKY:

Section 1

Section 37.03 of the Covington Code of Ordinances is amended to read as follows:

§ 37.03 DEFINITIONS.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

COMMERCIAL PURPOSE. The direct or indirect use of any part of a public record or records, in any form, for sale, resale, solicitation, rent, or lease of a service, or any use by which the user expects a profit either through commission, salary, or fee. **COMMERCIAL PURPOSE** excludes the publication or related use of a public record by a newspaper or periodical; the use of a public record by a radio or television station in its news or other informational programs; or the use of a public record in the preparation for prosecution or defense of litigation, or claims settlement by the parties to such action, or the attorneys representing the parties.

MECHANICAL PROCESS. Any operation or other copying procedure transacted on a machine, including a copier, computer, recorder or tape processor, or other automated device.

MEDIUM PROCESSING. The physical material in or on which records may be stored or copied;

OFFICIAL CUSTODIAN OF RECORDS. The City Clerk is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control.

OPEN RECORD. A record, or any part thereof, that does not fall under one or more statutory exemptions authorizing nondisclosure and must therefore be disclosed to the public.

PUBLIC RECORD. All books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency.

Statutory reference:

Similar provisions, see KRS 61.870(2), (4)(a),(b), (5), (7), (8) and 83A.085(3)(b)

Section 2

Section 37.04 of the Covington Code of Ordinances is amended to read as follows:

§ 37.04 REQUESTING PUBLIC RECORDS.

A) Open records rules and regulations governing access to the public records of the city, conforming to the provisions of KRS 61.870 to 61.884 shall be posted on the city's website and in a prominent location in all city offices to which the public has access- **and shall include the mailing address, email, and phone number of the City Clerk or their designee as well as the standardized form developed by the Kentucky Attorney General under KRS 61.876(4).**

B) Open records that are prepared, owned, used, in the possession of or retained by the city, and all public agencies operating under its jurisdiction, including those that are stored offsite or managed and maintained by a private vendor, shall be accessible to the public by means of onsite inspection, by delivery of copies through the U.S. mail, or, if the length of the document does not exceed 15 pages, by electronic transmission. Delivery of

copies by mail is limited to requesters who reside, or have their principal place of business, outside of the county who precisely describe the requested records “which are readily available within the public agency” and who prepays for copies and postage.

(C) No charge may be imposed for onsite inspection of open records and suitable facilities shall be made available for this purpose. The city shall determine whether suitable facilities for onsite inspection of electronic records includes the use of city computers on a case by case basis, focusing on availability (burdensomeness), system security, and the existence of reasonable alternatives.

(D) A reasonable fee, as described in § 37.06, may be imposed for copies of open records, including postage if the copies are mailed to the requester, and prepayment shall be required.

(E) All requests for public records shall be written and signed by the applicant with his or her name printed legibly and transmitted by U.S. mail, facsimile, hand-delivery, or e-mail.

(F) Open records requests shall be directed to the City Clerk or the City Clerk’s designee. In the City Clerk’s absence, at least one designee shall be authorized to perform all open records duties assigned to the City Clerk to ensure the timely and uniform processing of records requests. Misdirected requests shall be transmitted immediately to the City Clerk or the City Clerk’s designee and every city official or employee is responsible for ensuring immediate transmission of all misdirected requests to the City Clerk or the City Clerk’s designee.

(G) The City Clerk or the City Clerk’s designee shall ensure that open records requests are routed to all public agencies, and officers or employees attached to those agencies, operating under the city’s jurisdiction, for the purpose of making “a good faith effort to conduct a search using methods which can reasonably be expected to produce the records requested.” Those agencies, and their officers and employees, shall immediately locate, retrieve, and transmit to the City Clerk all responsive records located on public or private premises or devices for review, redaction, and disclosure or nondisclosure based on the records’ content. Those agencies, and their officers and employees, shall communicate to the City Clerk or the City Clerk’s designee any legally supportable claim of exemption based on the content of the records.

(H) Written requests must contain a description of the records sought, the signature of the requester, and the requester’s name printed legibly or typed. A preprinted form is available for the requester’s use and convenience on the city’s website at <https://www.covingtonky.gov> or by request, but the requester is not required to use the form as a condition of obtaining open records. The City Manager or the City Manager’s designee shall have the authority to create an appropriate form for the requestor’s use and convenience.

(I) A request to conduct onsite inspection of open records containing a description of the records that is “adequate for a reasonable person to ascertain [its] nature and scope” is legally sufficient. A request that copies of open records be mailed to the requester must contain a “precise description” of the records, and those records must be “readily available”. The City Clerk or the City Clerk’s designee may communicate with the requester to eliminate any confusion or doubt as to the scope of the request, or to otherwise facilitate access, but shall not ask the requester how the requester intends to use the records or the purpose of the request.

(J) Access to public records shall be granted, or denied, based on the records’ content and not on the identity of the requester or the requester’s purpose or intended use of the records.

(K) Public agencies, and officials and employees of public agencies, shall comply with the city’s uniform open records policy in accessing public records of the city or public agencies operating under its jurisdiction but shall, pursuant to KRS 61.878(5) enjoy an enhanced right of access to otherwise exempt public records if the public records are necessary in the performance of a legitimate government function or serve a legitimate governmental need. Public agencies, officials or employees who obtain otherwise exempt public records for these purposes shall ensure the records are not publicly disclosed.

(L) No requester shall be required to produce proof of identity to inspect, or obtain copies of, open records.

(M) No requester shall be permitted to remove original copies of city records from city offices without the written permission of the City Clerk or the City Clerk’s designee.

Statutory reference:

*Similar provisions, see KRS 61.872(1), (2), (3), (3)(b), 61.874(3), (4), **61.876(2), 4,** 61.878(5).*

Section 3

Section 37.05 of the Covington Code of Ordinances is amended to read as follows:

§ 37.05 RESPONDING TO PUBLIC RECORDS REQUESTS.

(A) The city’s final written response to a public records request shall be issued within ~~three~~**five** business days. This excludes Saturdays, Sundays, and legal holidays.

(B) In calculating the ~~[three]~~**five** day response time, the City may exclude the date on which the request arrived by U.S. Mail, fax, hand-delivery, or e-mail.

(C) If the public records request requires production of open records that are “in active use, in storage, or not otherwise available,” the city shall notify the requester, in writing and no later than the ~~[third]~~**fifth** business day, that it cannot immediately produce the requested records. The phrase “not otherwise available” has been construed by the Attorney General to include requests for voluminous open records. The written response shall include a citation to KRS 61.872(5) and a “detailed explanation of the cause for delay”. The demands of other public duties does not constitute a legally recognized basis for postponing release of the records. The written response shall also state the earliest date and time the records will be available. The written response to a request to inspect such records shall identify the place at which the records will be available for inspection in suitable facilities. The written response to a request for copies of such records by mail shall state that the requester will be notified of the actual cost of copying and postage on the same day the records are located, retrieved, and reviewed and that the records will be mailed upon prepayment of the copying and postage charges.

(D) The absence of the City Clerk or the City Clerk’s designee does not suspend or delay the ~~[three]~~**five**- day deadline for final written response.

(E) The response shall be issued by the City Clerk or the City Clerk’s designee, or under the Clerk’s or designee’s authority. The city shall maintain a comprehensive open records register to track all incoming open records requests and the disposition of those requests.

(F) The city’s final written response to a public records request, issued on the ~~[third]~~**fifth** business day, shall notify the requester that the request will be granted or denied. A written response to a request to conduct onsite inspection of open records, notifying the requester that the request is granted, shall advise the requester that the records are immediately available for inspection during the city’s regular business hours at a specifically designated location where suitable facilities are available.

(G) The city’s final written response to a request for copies of open records by mail, notifying the requester that the request is granted, shall advise the requester that the open records will be mailed upon receipt of payment to “City of Covington” in a specified amount based on the actual cost of reproduction and postage cost.

(H) The city’s final written denial of a request to inspect or obtain copies of exempted public records shall advise the requester that the request is denied, identify one or more of the ~~[16]~~ statutory exemptions found at KRS 61.878(1)(a) through (~~[p]~~**r**), and provide a detailed explanation of how the exemption(s) apply to the records, or any portion thereof withheld. The city recognizes that it has the burden of proof in sustaining denial of an open records request in an administrative challenge to the Kentucky Attorney General and the burden of proof in sustaining the denial in a judicial challenge in the courts.

(I) The city is not, in general, required to grant a request for information, as opposed to a request for existing public records. For example, “What were the results of the city’s last audit” is an improper request that the city is not obligated to grant. “Please provide a copy of the city’s most recent audit” is a proper request that the city is obligated to grant.

(J) If the requester seeks records that the city does not now have, nor ever had, custody or control of, the city shall notify the requester of this fact in writing. If the identity of the actual custodial agency is known, the city shall furnish the requester with the name and location of the official custodian of the agency’s public records. **Requests made for records in possession of the Legislative Research Commission shall be forwarded to the director of the Legislative Research Commission within two days of the request.**

(K) If the requester seeks city records that cannot be located, have been prematurely destroyed through error or inadvertence, or were required by law to be created but were never created, the city shall provide the requester with a candid explanation for the unavailability of the records. Destruction of a public record after a request is received is wholly impermissible and may constitute a violation of KRS 61.991(2)(a), relating to willful concealment or destruction of a public record and punishable as a Class A misdemeanor, or a violation of KRS 519.060(1)(b), relating to tampering with public records and punishable as a Class D felony.

(L) Records that originated in another public agency but are in the city’s custody as a “casual possessor” must be treated as city records unless state or federal law expressly require otherwise. The city shall respond to a request for such records as it would respond to any other records request but may wish to consult with the agency from which it obtained the records to ascertain if there is a legally supportable claim for exemption that the city should assert.

(M) (1) The city may deny a public records request that imposes “an unreasonable burden in producing public records” or “repeated requests” that the City Clerk or the City Clerk’s designee “has reason to believe are intended to disrupt other essential functions of the public agency based upon clear and convincing evidence” of an unreasonable burden or intent to disrupt essential functions.

(2) The courts have recognized that clear and convincing evidence is a “high proof threshold” but have not indicated what evidence meets this threshold. The Attorney General focuses on the number of records involved, or a good faith estimate of the number of records involved, the difficulties associated with locating, retrieving, reviewing, and redacting the records, whether one or more of the exemptions to public inspection require the redaction of particular information in the records, the number of staff hours, or a good faith estimate of the number of staff hours, required to fulfill the request, and the approximate cost to the agency based on these factors. A detailed description of the burden that includes this information shall be included in any denial based on unreasonable burden. Specific proof of bad faith, such as duplicative requests or requests that the agency grants but the requester never picks up, shall be included in any denial

based on intentional disruption of essential agency functions. KRS 61.872(6) should only be invoked to deny access to public records in the most extreme and flagrant cases.

(N) The city shall, upon payment of a reasonable fee as described in § 37.06, provide a requester with a copy of any open record it has permitted the requester to inspect. Inspection and copying are corollary rights.

Statutory reference:

Similar provisions, see KRS 7.119(6)(a), 61.872(3)(b), (4), (5), (6), 61.874(1), 61.880(1), (2)(c), 61.882(3)

Section 4

Section 37.07 of the Covington Code of Ordinances is amended to read as follows:

§ 37.07 STATUTORY EXEMPTIONS

(A) Kentucky courts recognize “[t]he unambiguous purpose of the Open Records Act, being KRS 61.870 to 61.884 is the disclosure of public records even though such disclosure may cause inconvenience or embarrassment”, but that “[d]espite its manifest intention to enact a disclosure statute, the General Assembly determined that certain public records should be excluded from disclosure” and that “[f]rom the exclusions we must conclude that with respect to certain records, the General Assembly has determined that the public’s right to know is subservient to statutory rights of personal privacy and the need for governmental confidentiality”.

(B) To promote accountability and ensure “open, honest, transparent and efficient government practices and policies”, the city has adopted a revised transparency policy at §§ 37.30 and 37.31 of this chapter. The revised transparency policy is intended to facilitate streamlined access to frequently requested records that do not compromise statutory rights of personal privacy or the need for governmental confidentiality by posting those records on the city’s website, <https://www.covingtonkv.gov> for immediate access. Sections 37.30 and 37.31 of this chapter supplements, but does not supersede, modify, or limit rights guaranteed under Kentucky’s Open Records Act, being KRS 61.870 to 61.884 and persons or entities wishing to obtain records and information identified in the ordinance may do so by means of an open records request.

(C) In all other cases, the city shall exercise a presumption in favor of openness except those in which the public’s right to know must yield to “statutory rights of personal privacy or the need for governmental confidentiality”.

(D) The General Assembly has enacted [16]**numerous** statutory exemptions found at KRS 61.878(1)(a) through (~~pr~~). In interpreting and applying these exemptions, the city shall be guided by the express language of the exemptions, case law construing the exemptions, and administrative guidance provided by the Kentucky Attorney General.

(E) The exemptions found at KRS 61.878(1)(a) through (~~pr~~) shall be “strictly construed” pursuant to the statement of legislative policy in KRS 61.871.

(F) Pursuant to KRS 61.878(1)(~~pr~~), “[c]ommunications of a purely personal nature unrelated to any governmental function” shall be exempt from public access. Communications from nongovernmental employees that address campaign or election issues, matters before the Board of Commissioners, or general city business are not purely personal and shall be subject to disclosure.

(G) In the event the City Clerk or the City Clerk’s designee requires assistance in determining whether to waive the city’s right to refuse access to material excluded from public inspection, the City Clerk or the City Clerk’s designee shall immediately request assistance from the Office of the City Solicitor. If the Office of City Solicitor requires assistance in determining whether to waive the city’s right to refuse access to material excluded from public inspection, that office shall immediately request assistance from the City Manager. If the City Manager requires assistance in determining whether to waive the city’s right to refuse access to material excluded from public inspection, the City Manager shall immediately request assistance from the Board of Commissioners who shall make the determination, notify the City Clerk or the City Clerk’s designee, and direct issuance of a final response.

(H) In accordance with applicable state law, the city shall not attempt to avoid responding to a lawful open records request submitted by a party involved in litigation, when the requested documents could be obtained through an applicable provision in the Kentucky Rules of Civil Procedure.

(I) The city shall not, by ordinance, order, contract or other formal or informal action, attempt to restrict access to, offer assurances of confidentiality for, or promise to withhold, public records that are not already exempt under one or more exemption codified at KRS 61.878(1)(a) through (~~pr~~).

(J) A city employee, or applicant for employment, is entitled to inspect and obtain copies of any records that relate to the employee or applicant, even if the records are statutorily exempt, unless the employee is under criminal or administrative investigation or requests a copy of an examination that will be given again. The city employee, or applicant for employment, shall comply with the city’s uniform open records policy in accessing public records of the city or public agencies operating under its jurisdiction.

(K) The city shall not withhold statistical information not descriptive of any readily identifiable person. The city is not, however, obligated to compile statistics that do not already exist to fulfill an open records request.

(L) If a requested public record contains both exempt and nonexempt information, the city shall separate the exempted information and make the nonexempt information available. The city shall identify the exemption relied upon in withholding exempted information in its final written response to the request and provide a detailed explanation of how the exemption applies to the information withheld.

(M) Although access to body worn camera recordings shall be governed by KRS 61.870 to 61.884, as well as the retention requirement set forth in the Local Government General Records Schedule, Records Series 6707, KRS 61.168 identifies 14 exceptions to the general rule of openness that the city may, in its discretion, invoke to limit access unless certain conditions, identified at KRS 61.168(5), are met.

(N) Public agencies, and officials and employees of public agencies, shall comply with the city's uniform open records policy in accessing public records of the city or public agencies operating under its jurisdiction, but shall enjoy an enhanced right of access to otherwise exempt public records if the public records are necessary in the performance of a legitimate government function or serve a legitimate governmental need. Public agencies, officials or employees who obtain otherwise exempt public records for these purposes shall ensure the records are not publicly disclosed.

(O) To the extent feasible, the city shall notify a person or persons affected by disclosure of records containing personal information that a request for records relating to the person(s) has been received and that the city intends to release the records two weeks from the date of notification. Such a person(s) has standing to bring an action against the city in Circuit Court to prevent disclosure of the records if the Court finds that disclosure of the personal information would constitute a clearly unwarranted invasion of personal privacy. The city shall agree to postpone final action on the request for two weeks, and afford the person(s) an opportunity to review the records in that period, but if no action has been initiated after two weeks, the city shall release the records.

Statutory reference:

Similar provisions, see KRS 61.878(2), (3),(4)

Section 5

That this ordinance shall take effect and be in full force when passed, published and recorded according to law.

MAYOR

ATTEST:

CITY CLERK

Passed: _____ (Second Reading)

_____ (First Reading)